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‘Once Upon a Time, In a Land Far, Far Away . . .’

Lawyers and Clients Telling Stories about Ethics (and Everything Else)

*Carolyn Grose**

I. INTRODUCTION

I got the call while on vacation — a long weekend, really — in Florida. My colleague was afraid she might have to withdraw from the custody case involving the adult, disabled daughter of her client.

What? Isn't there a hearing in that case next Friday? How can you withdraw? And wait a minute — why do you want to? You love this client. You've worked so hard for her. Has something happened?

Well, yes. It turns out the associate had met the client for coffee, as planned, and the client had brought the daughter along. The daughter has a lawyer. The daughter's lawyer, of course, had not been told about, let alone been present at, the meeting.

What should she do?

And then there are the sisters — one whom the lawyer has represented for more than five years, the other who had been there all along, right beside his client. Now they want him to draft wills for them. The hard-working, diligent, earnest associate did all his homework on client-centered lawyering and found himself tied in knots about whom he represented and how he could possibly draft wills for both women at the same time.

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These are just two examples of those subtle, complicated, knotty, but so simple situations that can and do trip up experienced and new lawyers alike as they try to figure out how to be effective and ethical advocates for and representatives of their clients. Can we be both client-centered and justice-centered?¹ Can we be both zealous advocates and upholders of truth and justice?² Can we serve as moral advocates without dominating our clients?³

In these two snapshots, and in many others like them, the ethical rules for lawyers⁴ provide little guidance, and their application rarely leads to a satisfying result for the client, for the lawyer, or for society. Further, as the increasing body of literature that addresses these questions illustrates, there is no consensus among scholars or practitioners on how a lawyer can, let alone should, act in trying to balance these competing obligations. Adding complexity to — or maybe in fact simplifying — this debate are the nuanced, complex, multifaceted experiences our clients share with us.

In this piece, I introduce the stories that describe those experiences. More precisely, I suggest a process for incorporating these stories into the analysis a lawyer undertakes to determine his obligations as an advocate for his client. Though both stories involve “ethical” issues arguably governed by the Rules of Professional Conduct, my analysis is not limited to or even necessarily focused on the system of ethical regulation. Instead, I use the Rules of Professional Conduct as a lens through which to examine aspects of the lawyer-client relationship. Drawing from the experiences of these

1. See Susan D. Carle, *Power as a Factor in Lawyers' Ethical Deliberation*, 35 HOFSTRA L. REV. 115 (2006) (describing different theories of ethical regulation).

2. See, e.g., MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 160-61 (3d ed. 2004); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 12 (1988); WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 2 (1998) [hereinafter SIMON, THE PRACTICE OF JUSTICE]; Carle, *supra* note 1; Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 75 (2000); William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099, 1105-06 (1994); William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469, 506-07 (1984); Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443, 517 (1999); W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 7-8 (1999) [hereinafter Wendel, *Public Values*]; W. Bradley Wendel, *Value Pluralism in Legal Ethics*, 78 WASH. U. L.Q. 113 (2000).

3. See THOMAS L. SHAFFER & ROBERT F. COCHRAN, LAWYERS, CLIENTS AND MORAL RESPONSIBILITY (1994); Stephen Ellmann, *Empathy and Approval*, 43 HASTINGS L.J. 991 (1992); Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987); Stephen Ellmann, *Truth and Consequences*, 69 FORDHAM L. REV. 895 (2000); David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454 (1981); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975).

4. The American Bar Association's Model Rules of Professional Conduct (“Rules of Professional Conduct” or “Rules”) have been adopted in whole or in part by every state except California to serve as the system of ethical regulation of lawyers. ABA, ABA Model Rules of Professional Conduct — Center for Professional Responsibility, http://www.abanet.org/cpr/mrpc/model_rules.html (last visited Feb. 27, 2009). I will be applying the Rules of Professional Conduct throughout this Article.

two sets of clients and their lawyers,⁵ I propose an approach to client representation that requires the lawyer to engage in a deeply contextual analysis of the specific and particular situation presented to him in any particular case, and work with his client to determine how to resolve whatever issues arise.

Part II of this Article introduces the stories of these clients as the lawyers came to know them and as the ethical dilemmas unfolded.⁶ This section sets the stage for further analysis both of the Rules of Professional Conduct and of the process lawyers undertake to understand and apply those Rules. Part III shifts the focus to the Rules themselves and tells the stories again, this time in the context of those Rules. This second telling reveals that the rules that make up the system of ethical regulation are interpreted to apply to generic, abstract clients in generic, abstract situations.⁷ As the retold stories illustrate, these generic, abstract interpretations do not work very well when applied to specific, unique situations.

Drawing on critical lawyering and narrative theory, Part IV proposes an alternative approach to resolving ethical conflicts. I suggest that the system of ethical regulation should be interpreted to allow room for the attorney to consider and incorporate the client's narrative context. With this proposal, I join the likes of theorists David Wilkins,⁸ David Luban,⁹ Robert Gordon,¹⁰ William Simon,¹¹ Deborah Rhode,¹² Russell Pearce,¹³ Thomas

5. While these stories all involve clinic students representing clients, my focus is on the students as lawyers, not as students. These same situations could easily arise in the practice of new or even experienced lawyers. I therefore refer to them throughout this Article simply as "the attorney" or "the lawyer," rather than as "the student."

6. Binny Miller has suggested that there is a difference between the terms "narrative" and "story" — that "story" involves the "raw material" of life, while "narrative" is the construction of meaning from that raw material. Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 GEO. J. LEGAL ETHICS 1, 1 (2000). See also Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 BUFF. L. REV. 141, 145 (1997). While I believe the distinction has interesting theoretical value, I do not use it in this paper, choosing instead to describe the stories and the process of constructing them explicitly.

7. See Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731, 1738 (1993).

8. See, e.g., David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992).

9. See, e.g., David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1993).

10. See, e.g., Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185 (2003).

11. See, e.g., SIMON, *THE PRACTICE OF JUSTICE*, *supra* note 2, at 9; William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1090 (1988) [hereinafter Simon, *Ethical Discretion*].

12. See, e.g., DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 66-67 (2000).

13. See, e.g., Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241 (1992).

Shaffer,¹⁴ Bradley Wendel,¹⁵ and Susan Carle¹⁶ in suggesting that context should play a significant role in any system of ethical regulation.¹⁷

The context that I am talking about, however, is the client's particular story. Such an approach places the client in the center of the inquiry and requires the lawyer and client to engage actively in dialogue and problem-solving. It allows the lawyer and client to arrive at solutions together that both respond to the particular client's needs and attend to the moral and ethical concerns the lawyer and society might have. By using a critically reflective, intentional process of inquiry around ethical concerns, the lawyer must focus on this particular client in the context of the client's life and the client's legal and non-legal needs in this particular situation. By widening the frame in this way and focusing on the client's whole story — not just his legal case — the lawyer is much better able not only to resolve whatever ethical or other conflicts may arise, but maybe even to avoid them altogether.

14. See, e.g., SHAFFER & COCHRAN, *supra* note 3.

15. See, e.g., Wendel, *Public Values*, *supra* note 2.

16. See, e.g., Carle, *supra* note 1.

17. In addition to the theorists discussed briefly here, Peter Margulies proposes that, at least when considering conflict of interest rules, the goals and missions of potentially conflicting clients act as the context against which to determine whether a conflict exists. Peter Margulies, *Multiple Communities or Monolithic Clients: Positional Conflicts of Interest and the Mission of the Legal Services Lawyer*, 67 FORDHAM L. REV. 2339, 2359-63 (1999). See also John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 FORDHAM L. REV. 1927, 1932 (1999); Bill Ong Hing, *In the Interest of Racial Harmony: Revisiting the Lawyer's Duty to Work for the Common Good*, 47 STAN. L. REV. 901 (1995).

Other scholars have suggested applying a contextual analysis based on various factors to other lawyer-client interactions. Kimberly O'Leary has suggested using a contextual method for choosing among different client counseling models by examining "three sets of variables": law practice settings; "specific values, desires, talents, cultural backgrounds, experiences, and attributes" of both attorney and client; and the lawyers' abilities "related to levels of experience, age, and professional growth." Kimberly E. O'Leary, *When Context Matters: How to Choose an Appropriate Client Counseling Model*, 4 T.M. COOLEY J. PRAC. & CLINICAL L. 103, 104 (2001). See also ROBERT F. COCHRAN, JR. ET AL., *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING* (1999); Robert D. Dinerstein, *Clinical Texts and Contexts*, 39 UCLA L. REV. 697 (1992); Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103 (1992); Ellmann, *Empathy and Approval*, *supra* note 3; Michelle S. Jacobs, *People From the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345 (1997); Robert Robinson, *Constructions of Client Competence and Theories of Practice*, 31 ARIZ. ST. L.J. 121 (1999); Ann Shalleck, *Theory and Experience in Constructing the Relationship Between Lawyer and Client: Representing Women Who Have Been Abused*, 64 TENN. L. REV. 1019 (1997).

II. THE LAWYERS' CONTEXT

A. (UN)REPRESENTED PARTIES: SAYRA AND LAURA'S STORY

The lawyer wanted to "put a face to the name." For months now, her¹⁸ client, Sayra,¹⁹ had been talking about Laura, her nineteen-year-old daughter: what she had been like as a baby and as a child, how much she loved animals, how she managed her mental disabilities (autism and developmental delay), how beautiful she was as a baby and is now, her struggles holding down jobs and getting through school, how well they had always gotten along, how much she missed Laura since she had moved in with her father, what they did together on visits. Laura was Sayra's favorite topic of conversation. It was natural curiosity and interest that led the lawyer to want to meet Laura.

Sayra had come to the lawyer six months earlier, referred by the lawyer's acupuncturist. She was looking for help modifying a custody order. Sayra and her ex-husband, Ishmael, had divorced two years before (though they were separated for six years before that), and the judge had granted full custody of Laura to Ishmael. Sayra had learned that Ishmael was planning to get married, and she came to the law office seeking to have Laura come back to live with her.

Even after six months as the lawyer's client, Sayra was reticent to the point of being shut down — except when talking about her daughter. The lawyer wanted to be responsive to her client, to try to bridge the gap of trust and confidence she still felt between them, so when Sayra shyly asked if she would like to meet Laura and her for coffee sometime, the lawyer could not see the harm. She knew, of course, that Laura was the subject of the custody dispute between Sayra and her ex-husband, and she also knew that Laura herself had an attorney.

So the three had coffee together. It was a pleasant half-hour. They talked about Laura's job, what she liked to do for fun, her dogs, her guinea pig. They also talked about whether she liked where she was living (with her father) and where she would like to live (with her mother). Laura never made eye contact with or spoke directly to the lawyer, but answered her questions through Sayra. As they talked, the lawyer could feel Sayra's

18. A word about gender and consistency: The lawyer in this story is a woman. In the next it's a man. But throughout the piece, when I talk about hypothetical lawyers or clients, not those described in these stories, the lawyers are sometimes male and sometimes female, as are the clients. I do this so as not to essentialize or build on stereotypes one way or the other.

19. The clients described in these snapshots are based on real cases that arose in the clinic I taught. Names and other identifying characteristics have been changed to protect confidentiality. There is some debate in the literature about the ethical propriety of using clients' stories in this way. See, e.g., Ann Juergens, *Teach Your Students Well: Valuing Clients in the Law School Clinic*, 2 CORNELL J.L. & PUB. POL'Y 339, 372-74 (1993); Miller, *supra* note 6.

pleasure at the connection among the three of them. Once Laura had left to go to work, Sayra was more open and expansive with the lawyer than she had ever been. They spent close to an hour talking about the divorce and the current custody situation in a way they never had before.

The lawyer left the coffee house feeling connected to her client and optimistic about their prospects in the custody hearing later that week. She also felt better able to represent Sayra effectively, and not only for legal reasons. Sure, she had met Laura and had seen her and Sayra interact. As such, she could form the judgment that Sayra was a fit mother and that it was in Laura's best interest to be with her. But she also felt that, having seen Laura and Sayra interact, she understood her client better, could see her more fully, and could tell the story of Sayra's relationship with Laura with greater investment and authority.

When Sayra's lawyer returned to her office and wrote up notes of the meeting, she remembered that rule about not talking with someone who is represented by counsel without that counsel's presence or consent.²⁰ Here, she had done just that! Knowing full well that Laura had a lawyer, she had gone ahead and met with the young woman without the other lawyer's knowledge, let alone consent. Not only that, but they had actually talked about the substance of the case. In her excitement about the opportunity to connect more fully and meaningfully with her client, the lawyer had completely forgotten about Rule 4.2 and had inadvertently violated it. Sayra's lawyer had connected with Laura not as another represented party, but as her client's daughter, a character in her client's story. She had discussed where Laura liked to live best not because it was the subject of the custody dispute but because it was part of the story Laura was telling.

After meeting with her senior partner, the lawyer called both the father's lawyer and Laura's lawyer and told them what had happened, including the full extent of the discussion about where Laura wanted to live. She apologized profusely, blaming the mistake on inexperience and on getting swept up in the human drama of the situation.

The father's lawyer did not have much of a reaction to the lawyer's confession, but Laura's lawyer was furious. She could not accept that the mistake had been made in good faith. She believed that Sayra had arranged the meeting and directed the conversation purposely to get Laura to say that she liked living with her mother better. To her, the situation was further evidence of Sayra's irresponsibility as a mother.

20. Rule 4.2 states:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

MODEL RULES OF PROF'L CONDUCT R. 4.2 (2002).

After some agonizing consultation with her colleagues and her client, the lawyer felt she had no choice but to offer to withdraw from the case, in part because she did not want to give Laura's lawyer the opportunity to use the mistake as evidence of Sayra's unfitness. The lawyer made her offer to withdraw on the morning of the scheduled custody hearing, along with a motion to continue the matter to give Sayra time either to find a new lawyer or to prepare to represent herself. The judge accepted the lawyer's offer to withdraw and granted the motion to continue the case for one month.

Despite her best efforts over the next weeks, the lawyer was unable to find anyone willing or able to take Sayra's case, and Sayra herself seemed very reluctant to pursue finding a lawyer on her own. She had not really understood why the lawyer had had to withdraw — all she did was meet her daughter, after all. Why was that such a big deal? But she had not put up a fight, and when last they spoke, Sayra seemed resigned and was preparing to represent herself at the hearing.

B. 'CONFLICTS' OF INTEREST: LILLIAN AND ELLIE'S STORY

Lillian had been a pro bono client of the lawyer forever, or so it seemed. She had fought child protective services so she did not lose her kids. He had figured out how to get the city to pay for rewiring the electrical system in her house to bring it up to code. He had got her higher unemployment benefits. Currently, he was negotiating with various creditors to consolidate and reduce her consumer debt. When something confused or frustrated Lillian, she called the lawyer, explained what it was she needed, and he looked into it.

Each September, the lawyer would meet with Lillian in the house she shared with her sister, Ellie. He would sit in the cozy, cluttered living room in a well-worn chair, facing Lillian and Ellie on the couch. Lillian had become increasingly infirm over the years, so she rarely got up off the couch but instead directed her sister to get the attorney this or that piece of paper, to refill soda glasses, to answer the phone, to bring in the latest pictures of Ellie's grandchildren. Ellie was a constant presence, hovering, ministering, filling in gaps of information.²¹ Lillian always knew exactly what she wanted from the lawyer; Ellie was there to help however she could so that what Lillian wanted got communicated.

Lillian loved the lawyer's passion and energy, he flourished under her praise and blessings, and learned enormous amounts about representing empowered clients who nonetheless needed help navigating particular systems. So when Lillian said she wanted the lawyer to draft wills for her and for Ellie, at first no one thought twice.

21. Ellie's presence, of course, raises questions about what kind of attorney-client privilege existed between the lawyer and Lillian. That, however, is for another time.

Then the lawyer became troubled: Who was his client? Lillian, right? So could he represent Ellie, too? The conflict of interest rule states that "a lawyer shall not represent a client if . . . the representation of one client will be directly adverse to another client."²² Further, "a lawyer shall not represent a client" if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."²³

The lawyer pondered the rule. If he agreed to write a will for Ellie, his representation of *Lillian* could be adversely affected. The lawyer currently represented Lillian with respect to financial matters. If Ellie were to decide not to leave any money or property to Lillian, this could jeopardize Lillian financially in the future. This would create an actual conflict between what Lillian wanted him to do and what Ellie wanted him to do.

In addition, because the lawyer had a longstanding relationship with Lillian based on the many issues on which he had represented her, the attorney-client relationship had taken on a personal nature. Because of the lawyer's sense of loyalty and responsibility to Lillian, his professional judgment on behalf of *Ellie* might be adversely affected.

Not to mention the confidentiality problem: Under Rule 1.6, a lawyer shall not "reveal information relating to the representation of a client" except under narrowly defined circumstances.²⁴ This means that if the lawyer were to write a will for Ellie, the lawyer could not reveal any of the information Ellie discussed with the lawyer to Lillian. Lillian could not be present when the lawyer interviewed Ellie about what she wanted the will to say, and the lawyer could not tell Lillian what Ellie wanted the will to say if Lillian were to ask. Which brought the lawyer back to the conflict of interest problem: If Ellie decided that she did not want to leave Lillian any money or property, this might jeopardize Lillian financially. Since the lawyer had an obligation to Lillian to look out for her financial situation, the lawyer would not be zealously advocating on her behalf if he knowingly withheld harmful information from her.

Neither the rule on confidentiality nor the rule on conflicts of interest, however, seemed an outright bar to representation under these circumstances. In fact, Rule 1.7 allows a lawyer to represent a client in a case like this if the attorney fully discloses to both clients "the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved," and obtains informed, written consent from both of them.²⁵ Rule 1.6 further provides that a lawyer "may reveal information relating to the repre-

22. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(1) (2002).

23. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2002).

24. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2003).

25. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) & cmt. (2002).

sentation of a client [if] the client gives informed consent” about the proposed use of the information.²⁶

So according to the Rules, the lawyer could draft a will for Ellie if he fulfilled the following conditions: He would have to meet with each sister individually, explain the potential conflict to her, and ask her to provide informed consent to proceed with the representation despite the conflict and to waive her right to confidentiality as to the other. He imagined that the conversations might go something like this:

Lillian, if I represent Ellie in drafting her will, and she decides not to leave any money to you, that would hurt your financial situation, and I would feel torn about helping her do that because of my loyalty to you. Plus, unless she tells me I can, I would not be able to tell you that she was not planning to leave you any money. Are you okay with that? If not, I will not represent Ellie.

Then, in the next room:

Ellie, if I help you draft your will, and you decide you do not want to leave any money to Lillian, that would hurt her financial situation, and I would feel torn about helping you do that because of my loyalty to her. And I might have to withdraw as your lawyer. Plus, I would like to be able to tell her what you plan to do with your money, but I cannot because if you’re my client, whatever you tell me stays between us, unless you tell me I can tell Lillian. Would you be willing to let me tell Lillian what you want to do with your money? If so, and if you’re okay with my having to withdraw if you do anything that might hurt Lillian, I would be happy to help you draft your will.

Armed with his research and copies of waivers and consents for everyone to sign, the lawyer went out to Lillian’s house to start the process. He sat in the cluttered and cozy living room, just as he had done so many times before, across the room from Lillian and Ellie, who sat on the couch side by side, as they always did. Lillian and Ellie looked expectantly at the lawyer. “So,” Lillian began, chuckling, “can we get this thing started? I know you people charge us by the hour.”

The lawyer looked back at her and cleared his throat.

“Well,” he said, “I actually need to talk to each of you alone a bit to see if you both really want me to write your wills.” The sisters looked back at him like he had just suggested they strip off all their outer garments.

“Well of course we want you to write our wills,” snorted Ellie indignantly. “That’s why we asked you to come out here today.”

26. MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2003).

"That's right," added Lillian. "What do you mean you need to talk to each of us separately? We're family. What you need to say to me, you can say to me in front of Ellie and same for her. That's how we do things around here. You know that."

The lawyer knew Lillian was right. He had never been alone with either woman for more than the two or three minutes it sometimes took for Ellie to fetch their drinks or documents or pictures. Once, in fact, he had arrived at the appointed time for their meeting only to be sent away because Ellie had been unexpectedly delayed and was not at the house. Lillian was not willing to have the meeting without Ellie there. He looked down at his papers, at a loss for how to proceed.

III. THE RULES' CONTEXT

A. INTRODUCTION

One place to start analyzing these ethical dilemmas and the light they might shed on the lawyer-client relationship is the relevant system of ethical rules and the stories underlying those rules. As a growing body of legal scholarship recognizes, not all stories are equal in the eyes of the law.²⁷ Rather, some stories are believed and valued by legal decisionmakers and thus become a part of the network of stories embodied in the dominant legal discourse — what I call "official stories."²⁸ Others are not believed or valued by the legal decisionmakers and thus remain outside that discourse. Scholars and critics have identified these as "outsider narratives" and have suggested that the "official stories" are official only because they are constructed as such; they are told by and about people familiar and similar to the "insiders" who hear the stories. Thus, those stories are easily incorporated into the dominant legal discourse.²⁹ Stories told by or about those un-

27. See, e.g., Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 65 (1991); Naomi R. Cahn, *Inconsistent Stories*, 81 GEO. L.J. 2475 (1993); Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665 (1993); William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993); Christopher Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861 (1992); Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803 (1994); Lucie E. White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861 (1990); Carolyn Grose, *A Field Trip to Benetton and Beyond*, 4 CLINICAL L. REV. 109 (1997) [hereinafter Grose, *Benetton and Beyond*].

28. Grose, *Benetton and Beyond*, *supra* note 27.

29. I use the terms "outsider narrative" and "outsider jurisprudence" generally to describe a movement in legal literature and academia to incorporate the voices of "outsiders" into mainstream legal dialogue. See, e.g., Professor Mari J. Matsuda, University of Hawaii, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, Keynote

familiar to the insiders hearing the stories do not fit easily into the insiders' worldview and thus do not become official stories. The system of official stories thereby reinforces both the dominant discourse and the silence of those outside that discourse.³⁰

This silencing is particularly invidious because it acts not only to silence a particular outsider but also to maintain the system of official stories that causes the silencing in the first place. The power and irony of this system is that as long as the official stories are the only ones that can be heard, believed, and thus retold, even the stories about those outside the system are accessible only through texts written by insiders about the lives of outsiders.³¹ The system of texts that make up the dominant legal discourse operates as one of what Foucault calls "regimes of truth."³² These regimes of truth serve to "legitimize what can be said, who has the authority to speak, and what is sanctioned as true."³³ Another way to describe hegemony, then, is that the insiders, the dominant group, have so effectively communicated their versions of reality to the rest of society that those stories have become embedded in what can be called "common sense" or "the natural order," or even "right and wrong."³⁴

B. STORIES EMBEDDED IN THE RULES OF PROFESSIONAL CONDUCT

The current system of ethical regulation operates as one of these regimes of truth. The Rules and their accompanying commentary deal not with the realities of outsider clients' lives, but with the clients as "card-

Address at the Yale Law School Conference on Women of Color and the Law (Apr. 16, 1988), in 11 WOMEN'S RTS. L. REP. 7 (1989). By "outsider," I mean someone who does not have access to the channels of power and communication in this society; conversely, an "insider" is someone who does have that access. The "outsider jurisprudence" or "outsider narrative" movement embraces many different theories and theorists, which are beyond the scope of this Article. See, e.g., Arthur Austin, *A Primer on Deconstruction's "Rhapsody of Word-Plays"*, 71 N.C. L. REV. 201, 230-31 (1992). See also DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 1-12 (1992); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 127-28 (1987) (all three Critical Race theorists using "outsider narrative" to expose how the law and society reinforce prejudice and discrimination).

30. See Carolyn Grose, *A Persistent Critique: Constructing Clients' Stories*, 12 CLINICAL L. REV. 329, 331 (2006) [hereinafter Grose, *Constructing Clients' Stories*].

31. Post-colonial theorist Gayatri Spivak describes these as texts "from the other side." Gayatri Chakravorty Spivak, *Subaltern Talk: Interview with the Editors*, in THE SPIVAK READER: SELECTED WORKS OF GAYATRI CHAKRAVORTY SPIVAK 307 (Donna Landry & Gerald MacLean eds., 1996) [hereinafter THE SPIVAK READER].

32. TEACHING FOR DIVERSITY AND SOCIAL JUSTICE 11 (Maurianne Adams, Lee Anne Bell & Pat Griffin eds., 1997) (quoting MICHEL FOUCAULT, 1 THE HISTORY OF SEXUALITY 3 (Robert Hurley trans., Vintage Books 1980)).

33. *Id.*

34. Grose, *Benetton and Beyond*, *supra* note 27, at 110; Grose, *Constructing Clients' Stories*, *supra* note 30, at 329.

board figures" in general.³⁵ They rely on stories about people who want to maximize their wealth and freedom and are willing to use whatever means necessary to achieve those goals.³⁶ We are certainly familiar with the stories from our Professional Responsibility casebooks about the clients who seek help from their lawyers to keep bodies hidden,³⁷ to forge financial documents,³⁸ or to perjure themselves.³⁹ As teachers, we have our students read these cases, and as lawyers we read them ourselves, to make sense of the set of rules we have to follow — rules that appear to have been written to give lawyers tools to constrain these immoral clients seeking to use the legal system to carry out their nefarious schemes.⁴⁰ While the body disposers, forgers, and perjurers are perhaps extreme versions of the "official stories" underlying the ethical rules, they are not so far off. Let us take a look at the particular rules implicated by the stories we are considering here.

1. The (Un)represented Party Story

First, there is the "narrative of the represented party," as codified in Rule 4.2. Rule 4.2 states:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.⁴¹

Commentary to Rule 4.2 states that its purpose is to protect a represented party from "overreaching," "interference," and "uncounselled disclosure of information."⁴²

35. Shalleck, *supra* note 7, at 1737.

36. *Id.*

37. See, e.g., GEOFFREY C. HAZARD, JR., SUSAN P. KONIAK & ROGER C. CRAMTON, THE LAW AND ETHICS OF LAWYERING 51, 57 (3d ed. 1999); STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 487-88 (5th ed. 1998); ANDREW KAUFMAN & DAVID WILKINS, PROBLEMS IN PROFESSIONAL RESPONSIBILITY FOR A CHANGING PROFESSION 202-03 (4th ed. 2002); LISA G. LERMAN & PHILIP G. SCHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW 124-26 (2005); THOMAS D. MORGAN & RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS 408-09 (7th ed. 2000).

38. See, e.g., LERMAN & SCHRAG, *supra* note 37, at 151.

39. See, e.g., *Nix v. Whiteside*, 475 U.S. 157, 176 (1986) (holding that counsel is obligated to violate a client's confidence where the client discloses an intent to perjure himself). See also HAZARD, KONIAK & CRAMTON, *supra* note 37, at 356; GILLERS, *supra* note 37, at 384; KAUFMAN & WILKINS, *supra* note 37, at 169-70; LERMAN & SCHRAG, *supra* note 37, at 489, 495; MORGAN & ROTUNDA, *supra* note 37, at 419, 421.

40. See, e.g., TERENCE C. HALLIDAY, BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT 39 (1987); Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639 (1981); Wilkins, *supra* note 8 (each providing an interesting analysis of different theories underlying professional ethical regulation).

41. MODEL RULES OF PROF'L CONDUCT R. 4.2 (2002).

42. MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. (2002).

So the main characters in our Rule 4.2 story are the client (Sayra) and her lawyer; and the other client (Laura, Sayra's daughter) and her lawyer. Ishmael, Sayra's ex-husband, plays a minor role, but appears as a character as well, as does his lawyer. The Rule seems to imagine the following story:⁴³

Once upon a time, there was a client named Laura who had a lawyer in a custody case.⁴⁴ All was fine until Laura's mother, Sayra, colluded with her own lawyer to take advantage of Laura. They sneaked up on her in a coffee shop without telling her lawyer and got her to admit all kinds of things about where she wanted to live and what made her happy. Luckily, Rule 4.2 provides redress for this situation by forcing Sayra's lawyer to confess what she has done to all the other characters. They get to decide what happens to her, and Laura and her lawyer can live happily ever after.

In order for this story to make sense, a number of assumptions about the characters must be taken as true. First, that Sayra is a wealth and freedom maximizer — in this case, she wanted to maximize her freedom to manipulate Laura and Ishmael and the legal system in order to achieve her nefarious goal of gaining custody of Laura. Second, that Sayra's lawyer is also unscrupulous and devious and believes that the way to achieve the client's goal of gaining custody of Laura is to sneak up on Laura. Third, that Laura herself is so easily manipulable and vulnerable and in need of protection that without her lawyer's presence, her manipulation and exploitation is a foregone conclusion. Finally, that Laura's lawyer is in fact a source of protection against that manipulation.

The Rule also relies on assumptions about the clients' goals and how to achieve them. Sayra's goal appears to be to regain custody of Laura at all costs. The story suggests that both Sayra and her lawyer believe that the

43. There is always more than one story, even an official one. I offer the following as one of the myriad of "official" stories that underlie Rule 4.2. I choose it because in many ways it is the simplest one to deconstruct as inapplicable to the facts of this particular client situation. See *infra* Part V (describing the potential usefulness of the Rules even with their official stories).

44. I am using the language and structure of narrative theory in constructing this story. See, e.g., ANTHONY G. AMSTERDAM & JEROME SEYMOUR BRUNER, *MINDING THE LAW* 113 (2000); Robert Robinson, *Client Counseling, Mediation, and Alternative Narratives of Dispute Resolution*, 10 CLINICAL L. REV. 833 (2004). For descriptions and analyses of the role of narrative theory in legal scholarship, see generally LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW (Peter Brooks & Paul Gewirtz eds., 1996); Alfieri, *supra* note 27; Gary Bellow & Martha Minow, *Introduction: Rita's Case and Other Law Stories*, in LAW STORIES 1-29 (Gary Bellow & Martha Minow eds., 1996); Robert M. Cover, *The Supreme Court, 1982 Term, Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Clark D. Cunningham, *A Tale of Two Clients: Thinking about the Law as Language*, 87 MICH. L. REV. 2459 (1989); Farber & Sherry, *supra* note 27; Grose, *Benetton and Beyond*, *supra* note 27; Binny Miller, *Give Them Back Their Lives*, 93 MICH. L. REV. 485, 563-67 (1994) [hereinafter Miller, *Give Them Back Their Lives*]; Binny Miller, *Teaching Case Theory*, 9 CLINICAL L. REV. 293, 297-307 (2002) [hereinafter Miller, *Teaching Case Theory*].

easiest way — if not the only way — for Sayra to achieve her goal is through this manipulation of Laura, that there is no non-nefarious means of achieving her goal, and that no story that would make sense without manipulating Laura. It assumes all three clients are in conflict with one another and that their goals are therefore irreconcilable, Ishmael's goal is also to gain custody of Laura at all costs, and Laura's goal is to have the issue resolved without consideration of the goals of either of her parents. It also assumes that, left to their own devices, these clients could not possibly work out a solution that met everyone's needs, so the lawyers must be present at all times to save the clients from themselves. Finally, it assumes that lawyers can actually act as moral, unifying, and compromising influences. Notice how this assumption tends to contradict the other assumption about the nefarious motives of Sayra's lawyer. Which is it? Is the lawyer a manipulator, a protector, or a mediator?

Rule 4.2 also relies on a theme that recurs throughout the Rules of Professional Conduct: the lawyer-client dyad. We will see this more clearly in the stories underlying the conflict and confidentiality rules, but even here, we see a codification of the insularity of the lawyer-client relationship. Laura and her lawyer would live happily ever after if only Sayra's lawyer were banished from the kingdom.

2. The 'Conflicts' of Interest Story

Now let us turn to the "narrative of the conflicting interests." The basic conflict of interest rule, Rule 1.7, states, "A lawyer shall not represent a client with respect to a matter [if] representation of another client will be or is likely to be adversely affected by such representation."⁴⁵ In addition, Rule 1.6 states, in part, "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent."⁴⁶ The comments to both Rules highlight loyalty and independence as "the essential elements in the lawyer's relationship."⁴⁷

So who are the characters in the stories embedded in these Rules? There is Lillian, the longtime client, and her lawyer. There is also the new client, Ellie, who wants the lawyer to represent her. The rules against dual representation imagine a story in which Ellie and Lillian either do or could have secrets and private lives that exist in inherent conflict with each other. For example, Ellie might secretly want to give most of her money to one of her children, not to Lillian. Or Lillian might secretly be plotting to kill off Ellie so she can get her hands on Ellie's money — that is why she wants the lawyer to draft their wills. The lawyer must be very careful both to protect the clients from each other and to protect himself from the clients by having them sign waivers of conflict and confidentiality.

45. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(3) (2002).

46. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2003).

47. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(3) & R. 1.6 cmt. (2003).

This story, too, rests on a number of assumptions about the client, the lawyer, and the narrative itself. First is the notion that a client is by definition an individual, and protection of that individual's autonomy is the lawyer's paramount duty.⁴⁸ Ellie and Lillian, according to Rule 1.7, must be independent and distinct, moral and social actors whose interests, needs, and goals risk being in conflict — being as they are the interests, needs, and goals of independent and distinct entities.

Second is the idea that the lawyer cannot possibly hold all of these interests, needs, and goals at once without violating either or both clients' rights as autonomous individuals. Here, we see again the theme of the lawyer-client dyad. The story embedded in these ethical rules seeks to codify loyalty on the part of the lawyer by defining his representation of another client with overlapping interests as a betrayal of his relationship with his current client. The rules against concurrent representation describe a monogamous, spousal relationship between the lawyer and the client. Any attempt by the lawyer to go outside that relationship is prohibited absent the consent of both the current client (the spouse) and the new client (the lover).

Finally, as with the story underlying Rule 4.2, the story underlying Rules 1.6 and 1.7 rests on the assumption that the three characters — Ellie, Lillian, and the lawyer — cannot work it out on their own. Instead, they need the very formal and formulaic safeguards required by the Rules to protect the two clients from each other and to protect the lawyer from the two clients.⁴⁹

3. The Official Stories

Because they are written in the language of individual rights and autonomy, and conflict and adversity, all of these rules ignore the possibil-

48. See Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 401-14 (2006) (describing the challenge between balancing client autonomy with lawyer paternalism). See also Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 512-13 (1990); Ellmann, *Lawyers and Clients*, *supra* note 3, at 759-60; Luban, *supra* note 3; Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315, 316-17 (1987).

49. Much has been written on the effect that overly restrictive conflict rules have on clients' access to justice. See, e.g., Margulies, *supra* note 17, at 2342. There are other critiques of conflict rules, as well. See, e.g., John S. Dzienkowski, *Positional Conflicts of Interest*, 71 TEX. L. REV. 457 (1993); John Leubsdorf, *Using Legal Ethics to Screw Your Enemies and Clients*, 11 GEO. J. LEGAL ETHICS 831 (1998); Nancy J. Moore, *Conflicts of Interest for In-House Counsel: Issues Emerging from the Expanding Role of the Attorney-Employee*, 39 S. TEX. L. REV. 497, 499 (1998); Douglas R. Richmond, *Choosing Sides: Issue or Positional Conflicts of Interest*, 51 FLA. L. REV. 383, 384-86 (1999); Norman W. Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 STAN. L. REV. 1395 (1998); Fred C. Zacharias, *Waiving Conflicts of Interests*, 108 YALE L.J. 407, 437-38 (1998).

ity of connections among multiple "parties," the complexity of familial and domestic arrangements, and the nuances of communication and problem-solving across interests and values. This particular regime of truth — the system of ethical regulation — operates by failing to recognize, let alone appreciate, the different sets of values, priorities, customs, and relationship structures of "outsider" clients.⁵⁰ The Rules render invisible very significant "other" people, designating them as "third parties" and therefore legally irrelevant, or at least less privileged in the current legal forum.⁵¹

In short, the Rules of Professional Conduct operate on stories that do not belong or bear any relation to Sayra and Laura or to Ellie and Lillian. Instead, the Rules resolve troubles that might not exist for these clients, or they address characters that might not populate the clients' lives. As such, the application of these rules might very well leave these clients worse off than they were when they walked into their lawyers' offices.⁵²

IV. THE CLIENTS' CONTEXT

A. A CALL TO CONTEXT⁵³

An alternative approach to these ethical dilemmas, and to the idea of client representation overall, would allow for the complexity of client contexts by giving the lawyer discretion to inquire into and incorporate the multiplicity of client's stories. This approach would not only make room for outsider voices; it would also be a more effective and moral system. If lawyers, under the system of ethical regulation, are able to make judgments based on the full frame of their clients' lives (For example, is this really a conflict between these two women? Are the concerns of Rule 4.2 necessarily implicated by this particular family structure?), those judgments are

50. For feminist theoretical analyses of moral and ethical dilemmas, see, e.g., CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 173-74 (1982); Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599, 1697-99 (1991); Sylvia R. Lazos Vargas, *Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity*, 58 MD. L. REV. 150, 155 (1999); and Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, in LAWYERS' ETHICS AND THE PURSUIT OF SOCIAL JUSTICE 274 (Susan D. Carle ed., 2005). See also *supra* notes 27-30 and accompanying text.

51. Kimberly O'Leary critiques the ethical rules for their failure to consider the interests, needs, and goals of what are legally considered "third parties" (and therefore legally irrelevant at best). Kimberly E. O'Leary, *Using "Difference Analysis" to Teach Problem-Solving*, 4 CLINICAL L. REV. 65, 70-72 (1997).

52. Kruse warns that "a lawyer's failure to confront the interrelationship of a client's legal issues with the non-legal aspects of a client's problem will at best only partially address the client's problem; and at worse may leave the client worse off than before the legal representation began." Kruse, *supra* note 48, at 377.

53. See Calmore, *supra* note 17, at 1927-28; Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2106 (1989); Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLINICAL L. REV. 427, 488-89 (2000).

more likely to be “good” judgments for the lawyer, for the client, for the judicial system, and for society — such judgments respond to the problems of real people in real life situations. As Phyllis Goldfarb describes, “ethics becomes a sustained practice of empirical attention and reflection on the actions of people in actual situations. . . . The better our context-sensitive empiricism, the better our moral deliberations, and the more precise the articulation of our ethical principles will be.”⁵⁴

I suggest, therefore, that the system of ethical regulation should be interpreted to allow room for the attorney to consider and incorporate the client’s narrative context. My proposal joins those of other ethical scholars who suggest context should play a significant role in any system of ethical regulation.⁵⁵ David Wilkins has argued forcefully that “[c]ontext must replace universality as the touchstone of system design.”⁵⁶ He describes his notion of context as including an examination of “task (for example, litigation versus counseling), subject matter (for example, civil versus criminal), and status (for example, plaintiff versus defendant)[,] lawyer (for example, sole practitioner versus large firm) and client (for example, individual versus corporate).”⁵⁷ He looks, in other words, to the “*social and institutional context*” of the case.⁵⁸ David Luban and Robert Gordon have joined Wilkins in suggesting that ethical regulation should vary according to the practice area in which the issue arises.⁵⁹

Luban joins other “justice-centered”⁶⁰ theorists who look to the *context of the judicial system* as a whole. These scholars, including William Simon,⁶¹ Deborah Rhode,⁶² Russell Pearce,⁶³ Thomas Shaffer,⁶⁴ Bradley Wendel,⁶⁵ and others,⁶⁶ are concerned with the harm lawyers can cause to the legal system, and more specifically to “the fragile fabric of public regulatory law.”⁶⁷ They propose that the lawyer’s ethical obligations be “ana-

54. Goldfarb, *supra* note 50, at 1698.

55. *See supra* note 17.

56. David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 515 (1990).

57. *Id.* at 517.

58. *Id.* at 516. *See also* Wilkins, *supra* note 8, at 814-19 (arguing that regulatory measures should vary with practice context).

59. *See, e.g.*, Gordon, *supra* note 10; Luban, *supra* note 9.

60. Carle, *supra* note 1, at 116.

61. *See, e.g.*, SIMON, *THE PRACTICE OF JUSTICE*, *supra* note 2, at 9. *See also* Simon, *Ethical Discretion*, *supra* note 11, at 1090 (“[T]he basic maxim of the approach I propose is this: The lawyer should take those actions that, considering the relevant circumstances of the particular case, seem most likely to promote justice.”).

62. *See, e.g.*, RHODE, *supra* note 12, at 66-67.

63. *See, e.g.*, PEARCE, *supra* note 13.

64. *See, e.g.*, SHAFFER & COCHRAN, *supra* note 3.

65. *See* Wendel, *Public Values*, *supra* note 2.

66. For more detailed analyses of the justice-centered theory, see generally LAWYERS’ ETHICS AND THE PURSUIT OF SOCIAL JUSTICE (Susan D. Carle ed., 2005); Carle, *supra* note 1; Katherine R. Kruse, *Lawyers, Justice and the Challenge of Moral Pluralism*, 90 MINN. L. REV. 389, 393-94, 441-58 (2005).

67. Carle, *supra* note 1, at 117.

lyzed with a paramount focus on achieving justice,"⁶⁸ and that their fidelity be not to "their own moral principles, but . . . to the moral principles inherent in the law."⁶⁹

Attempting to harmonize theories of justice-centered and client-centered ethicists,⁷⁰ Susan Carle looks to the *context of the parties' respective power*.⁷¹ She explains that "[i]n the context of representing powerful clients, lawyers' incentive is to do too much for their clients; in the context of clients lacking substantial resources, lawyers' incentive is to do too little."⁷² She suggests, therefore, that the relative power of the individuals or entities involved in a particular situation might justify contextual application of ethical rules.⁷³

I add to these my own call to context, but the context that I am talking about is the *client's narrative*. This might include, but is certainly not limited to, a consideration of what kind of case she has, what system she's up against, or her relative power. An exploration of this kind of context entails a widening of the frame of the client's legal problem: an investigation into its history, a consideration of where the client is socially and culturally situated, and a "mapping [of] the web of relationships in which the problem arises."⁷⁴

An inquiry into the client's narrative context would involve learning about her steady state, which Jerome Bruner and Anthony Amsterdam describe as a state "grounded in the legitimate ordinariness of things."⁷⁵ That is, what did the client's day look like? What did it feel like? What characters, animate or inanimate, filled her day? What did she do and not do regularly? What was her life like before the trouble began?

The trouble, of course, describes the reasons for the client's visit to the lawyer.⁷⁶ Something happened to disrupt her "legitimate ordinariness."⁷⁷ What was it? Who was it? What happened? The trouble, then, involves much more than just the client's "legal" issue. To fully understand why the client has come to the lawyer, the lawyer must come to be familiar with the multiple layers of the client's steady state, and how and why it has been disrupted by the trouble she describes.

68. Carle, *supra* note 1, at 116.

69. Kruse, *supra* note 66, at 430.

70. The scholars most typically identified as client-centered ethicists are Abbe Smith and Monroe Freedman. See, e.g., FREEDMAN & SMITH, *supra* note 2; Smith & Montross, *supra* note 2, at 517.

71. See, e.g., Carle, *supra* note 1, at 119 (proposing that "[a]ttention to client power" be used "as a factor in guiding lawyers' exercise of ethical discretion").

72. *Id.* at 119.

73. *Id.*

74. Piomelli, *supra* note 53, at 489 (emphasis removed).

75. AMSTERDAM & BRUNER, *supra* note 44, at 113. See also note 44 and accompanying text.

76. E.g., AMSTERDAM & BRUNER, *supra* note 44, at 114.

77. *Id.* at 113.

The lawyer must also inquire into and come to understand what efforts at redress the client has made or would like to make.⁷⁸ How can the trouble be resolved? How does the client want it to be resolved? Does she want to return to the steady state, or does she seek some kind of transformation? Finally, does the client's story carry with it a message, a moral, a coda for the client, for the story's characters, for the lawyer, for the system in which the client's situation arises?⁷⁹

This call to context builds on traditional client-centered theory, which demands that lawyers attend to their clients and work together with them to identify and achieve the goals of the representation.⁸⁰ It also expands on that theory by suggesting that lawyers, and the system that regulates them, should work to hear their clients' stories for what they are: unique and particular stories comprised of legal and non-legal elements that are fluid and evolving, not static or unchanging.⁸¹ As Kate Kruse remarks, "[c]lients come to lawyers, not to get answers to routine legal questions, but to get help solving problems that are deeply embedded within particular contexts."⁸²

So the ethical regulatory scheme should reflect and respond to those particular contexts, or stories. Instead, the ethical regulatory scheme reflects and responds, at best, to abstract, general stories, and, at worst, to particular stories that bear little if any relation to the stories of clients like Laura and Sayra, or Ellie and Lillian. The rules that make up this regulatory scheme thus end up, at best, ignoring these clients, and, at worst, silencing them. My call to context obligates lawyers to interpret the regulatory scheme consistent with their clients' descriptions of their legal and non-legal concerns, thus rendering the clients once again as characters in their own stories.

An articulation of ethical principles that addresses specific problems is more likely to solve those problems in authentic, meaningful, and long-lasting ways. Lawyers are more likely to follow such principles, and clients are more likely to receive satisfying legal assistance.⁸³ Because our system of ethical regulation must provide some measure of predictability, uniformity, and enforceability, the Rules of Professional Conduct themselves cannot be written to address with particularity the unique and spe-

78. *E.g.*, AMSTERDAM & BRUNER, *supra* note 44, at 114.

79. *Id.*

80. *See, e.g.*, DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (2d ed. 2004); Dinerstein, *supra* note 48, at 585-86.

81. *See, e.g.*, Kruse, *supra* note 48, at 401-14 (describing the differences between traditional client-centered lawyering and critical lawyering theory); Piomelli, *supra* note 53, at 511-12 (explaining that a lawyer's collaboration with clients regarding their stories can be a more effective strategy than where there is no collaboration); Shalleck, *supra* note 7, at 1742.

82. Kruse, *supra* note 48, at 374.

83. *See* Goldfarb, *supra* note 50, at 1686-87 (describing a feminist clinical program that would seek to remake the attorney-client relationship).

cific problems inherent in our clients' stories. But they can be *read* to do so. Thus, the system I propose gives the lawyer discretion to enter into meaningful dialogue with his client about her particular context. He can work with her to determine how her concerns fit in to the regulatory system and how the regulatory system can be interpreted to respond to her concerns.

This system, however, is only as good as the lawyer's use of his discretion. Since the lawyer is himself an insider, the lawyer must exercise his discretion with intention and awareness, and not simply ratify the official stories we saw in the preceding section⁸⁴ by reflexively applying the black letter rules. If the lawyer is able to do this authentically — through critical reflection and collaboration with his client — the ethical problems I described above might not even come up, let alone result in withdrawal or declining cases. The lawyer and client together will be able to construct and tell a story that meets the needs of the client, the third parties, and the legal system.⁸⁵

B. CRITICAL REFLECTION

The first step in this process must be for the lawyer to be able to hear the clients' stories in a different way from the way that the Rules of Professional Conduct suggest they should be heard. This is tricky. Without critical reflection, it is virtually impossible for the lawyer to know — to see, to hear, to understand — her clients.⁸⁶ Too often, lawyers unconsciously rely on their knowledge of and familiarity with the tools of their craft — language and rituals of the law — and skip over the necessary step of attempting to see and hear their client. The story they tell to the audience outside the relationship, therefore, is at best, a distorted version of the client's story, and at worst the lawyer's own version of what she thinks the client's story is or should be. In neither case is the client herself able to speak or be heard.

The challenge deepens for lawyers who seek to represent clients who are marginalized from mainstream American society.⁸⁷ Those clients are oppressed not only by the system in which they are trying to operate but

84. See *supra* notes 41-49 and accompanying text regarding the official stories underlying Rules 4.2, 1.7, and 1.6.

85. Gerald Lopez describes this process in areas other than resolving ethical conflicts. See GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* 43 (1992).

86. See Grose, *Constructing Clients' Stories*, *supra* note 30, at 332.

87. See Janet E. Ainsworth, *Categories and Culture: On the "Rectification of Names" in Comparative Law*, 82 CORNELL L. REV. 19, 26 (1996) (discussing how representation is already generally suspect, without taking into consideration matters of philosophical and political dimensions); Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in *MARXISM AND THE INTERPRETATION OF CULTURE* 271 (Cary Nelson & Lawrence Grossberg eds., 1988) (discussing the representation of marginalized subjects in Western discourse and suggesting an alternative process for relating those subjects to that discourse).

also by their lawyer's inability to see and hear them as needed to portray them adequately within that system. More than just telling a wrong or incomplete story about the client, the lawyer's attempts to portray the outside voice without critical reflection further marginalizes the client by keeping her voice outside the dominant legal discourse.

To represent clients whose personal stories do not conform to the official stories on which the ethical rules are based, lawyers must attend to their clients' different realities. The lawyer's goal, though, is not to arrive at some submerged, alternate reality, but rather to create the space for the client to speak by examining whatever is inhibiting the lawyer from hearing. The most important element in representation is not portraying the "other" with verisimilitude (what really happened, what her story really is, finding out and telling the "truth"), but rather to engage in critical reflection to undertake a collaborative process with the client to construct a narrative that rings true to her experience and meets her goals.⁸⁸

We all pass stories through our own pre-existing screen of "knowledge" about how people act. Because the stories of those outside the hegemonic discourse often conflict with that pre-existing "knowledge," a tension arises between what the insiders "know" about the outsiders and what the outsiders' stories are describing. Confronted with this tension, insiders often choose not to question their own version of reality (what they "know" is "true"), but instead to recast the outsider's story into terms and language that make it consistent with the insiders' understanding of reality.⁸⁹ As we have seen, the problem of trying to hear the stories of particular clients is that our assumptions about people and how they act, who they are, and what they need, prevent us from being able to hear the actual person standing before us. Moreover, our attempts to "translate" a person's story into language that we can hear further silence her because those very attempts take place against this backdrop of pre-understanding and assumption.

The answer to this problem is not to become paralyzed or complacent, but rather to be aware that it is a problem and to pay attention. It has long been understood that one of the ways to challenge hegemony and the resulting oppression is "to make visible and vocal the underlying assumptions that produce and reproduce structures of domination."⁹⁰ In order to

88. See Grose, *Constructing Clients' Stories*, *supra* note 30, at 332.

89. See, e.g., Marc A. Fajer, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 GEO. L.J. 1845, 1856 (1994) ("Faced with a conflict between deep-seated beliefs and a contradicting story, some people may adjust their beliefs, but others are likely to reject the story as untrue."). See also Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 263 (1994); Gary Peller, *The Discourse of Constitutional Degradation*, 81 GEO. L.J. 313, 322-23 (1992).

90. TEACHING FOR DIVERSITY AND SOCIAL JUSTICE, *supra* note 32, at 11. See also *id.* at xvii ("Our goal in social justice education is to enable students to become conscious of their operating world view and to be able to examine critically alternative ways of understanding the world and social relations.").

do this, we need to be consciously and vigilantly aware of what we bring to our representation of clients. We need to engage in critical reflection in order to uncover the assumptions through which we tend to pass all information that comes our way, including how we define and categorize people seeking our legal assistance.⁹¹ We need to attend to the unstated values that underlie legal norms and rules. We need to make explicit to ourselves how we have been socialized as lawyers and how that socialization affects how we see our clients.⁹²

Through critical reflection, the lawyer self-consciously situates herself within the particular context in which she is operating. Specifically, she situates herself in relation to the legal system and its rules. She also situates herself in relation to the other characters involved both in the system in general and in the particular interaction of which she is a part. Those other characters could be the other people involved: the judge, the other lawyers, the witnesses, the government agency, the opposing party, or the client. But the other characters could also be the relevant rules, rituals, and practices of the particular system.

Through critical reflection, the lawyer is able to identify her ability to operate among these characters as well as the limitations on that ability, noticing what prevents her from moving freely among the various pieces of the system. She is also able to identify the ability of the other characters,

91. See Grose, *Constructing Clients' Stories*, *supra* note 30, at 332. See also Jane H. Aiken, *Provocateurs for Justice*, 7 CLINICAL L. REV. 287, 298 (2001) ("Critical reflection has at its root an attempt to tease out or hunt down assumptions.").

92. Clinicians and other legal academics have written extensively on the challenges of teaching cross-cultural and/or client-centered lawyering so that students (who eventually become lawyers) are able to surmount this problem. See, e.g., Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001); Robert Dinerstein et al., *Legal Interviewing and Counseling: An Introduction*, 10 CLINICAL L. REV. 281, 281-309 (2003); Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability and Age in Lawyering Courses*, 45 STAN. L. REV. 1807 (1993); Shin Imai, *A Counter-Pedagogy for Social Justice: Core Skills for Community-Based Lawyering*, 9 CLINICAL L. REV. 195, 207-08, 210-11 (2002); O'Leary, *supra* note 51, at 66; Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37, 60-62 (1995); Marjorie A. Silver, *Emotional Competence, Multicultural Lawyering and Race*, 3 FLA. COASTAL L.J. 219, 237-42 (2002); Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373, 378 (2002); Paulette J. Williams, *The Divorce Case: Supervisory Teaching and Learning in Clinical Legal Education*, 21 ST. LOUIS U. PUB. L. REV. 331, 371-73 (2002). See generally Elizabeth M. Iglesias, *Identity, Democracy, Communicative Power, International Labor Rights and the Evolution of Latcrit Theory and Community*, 53 U. MIAMI L. REV. 575 (1999); Jacobs, *supra* note 17; Ascanio Piomelli, *Cross-Cultural Lawyering by the Book: The Latest Clinical Texts and a Sketch of a Future Agenda*, 4 HASTINGS RACE & POVERTY L.J. 131 (2006); Michael K. Power, *Habermas and the Counterfactual Imagination*, 17 CARDOZO L. REV. 1005 (1996); Francisco Valdes, *Outsider Jurisprudence, Critical Pedology and Social Justice Activism: Marking the Stirrings of Critical Legal Education*, 10 ASIAN L.J. 65 (2003); Carwena Weng, *Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness*, 11 CLINICAL L. REV. 369 (2005).

particularly the people, to move freely within the system, and the impediments on their ability to do so. By noticing these things, the lawyer can further identify the available choices about how to operate within the system in which she is situated. She can then identify the impact those choices have on her position, on the position of the other characters in the system, and on the system itself. In this way, therefore, critical reflection is the means for the lawyer to identify the shifting nature of her position within the particular context in which she is situated, the shifting nature of all the other characters situated in that context, and the shifting nature of the context itself.⁹³

This process could be called strategic planning or knowledge of precedent or even familiarity with the various personalities involved. On a deeper level, however, this kind of critical reflection provides an opportunity to deconstruct what we know about facts, about law, about client identity, and about how all those elements interact with one another. In short, it allows us to be better advocates for our clients.

In the context of the clients described here, critical reflection means the process of asking questions and looking for answers about what the client actually wants and cares about. Through that process, the lawyers might come to a better understanding of what brought their clients to them and, as a result, might be better able to resolve whatever ethical or other issues that could arise. Through time and deliberate effort — asking questions and really listening to the answers — the following stories are what the lawyers might put together within the first couple meetings with the clients.

1. Sayra and Laura's Story Revisited

The lawyer for Sayra might wonder why her client is so reluctant to talk. She might ask herself: Why has Sayra never had a lawyer before? What was going on that made the judge award custody to the father? Why did it take them so long to get divorced? How effective has Laura's representation been? What does "severe autism" mean? What are Laura's "developmental delays"? What are the interests at stake here? Are those interests really protected or threatened by the relevant ethical rule?

The lawyer might also look carefully through the file, not merely to learn the legal status of the case, but also to piece together the story she does not know yet, the one the client has not told her, but the clues of which are in the file.

Laura's father, Ishmael, married Sayra while they were both in high school, when they learned Sayra was pregnant. Laura was diagnosed with autism and developmental delay at age three. Sayra and Ishmael separated amicably when Laura was ten years old. Though Laura lived with Sayra,

93. See Grose, *Constructing Clients' Stories*, *supra* note 30, at 329; Piomelli, *supra* note 53, at 488-89; Shalleck, *supra* note 7, at 1753.

Ishmael was an active and attentive father who spent a lot of time with Laura both at his house and at Sayra's. Though they had no formal custody or visitation schedule, Laura spent roughly half her time with each parent.

Sayra has worked at an acupuncture and Traditional Chinese Medicine practice as a sort of messenger, cleaning person, and assistant ever since Laura, at the age of five, started going to school. Right from the start, one of the women's health practitioners, Carla (who is the lawyer's acupuncturist), took an interest in Sayra and Laura, and she taught Sayra about herbal and homeopathic remedies that could be used to address some of Laura's developmental and behavioral issues. Sayra tried them with Laura and found them to work well.

Shortly after she and Ishmael separated, Sayra began to realize that she had a problem with alcohol. She and Ishmael had been big drinkers in high school, and though she never went to parties anymore, she still drank herself to sleep most nights. Sayra worked with Carla for about a year and managed to give up drinking completely. She has been sober ever since.

Six years later, Ishmael's boss confronted him about his drinking problem and warned him that he would be fired unless he cleaned himself up. Ishmael went into a twenty-eight-day rehab program, followed by a year of daily meetings with Alcoholics Anonymous. He is now down to one meeting a week, unless he feels the need for more. He has been sober for two years.

While in rehab, Ishmael became involved in a fathers' rights group and began to think he might want to have Laura live with him full-time. He also became involved with a new woman, who convinced him to hire a lawyer and go to court to get custody of Laura, who by then was sixteen years old. So six years after their initial separation, Ishmael filed a complaint for divorce, seeking full legal and physical custody of Laura.

Sayra was concerned, but not concerned enough to get a lawyer herself. She is a very private, shy person who does not like the idea of having a stranger involved in her personal life. Ishmael had felt the same way, which is why they had not sought a divorce from the beginning. They both had felt like they could work out their problems on their own. Sayra was therefore surprised when Ishmael showed up in court with a lawyer, and even more surprised when the judge appointed a lawyer for Laura. Laura's lawyer argued that because of Sayra's history of alcoholism and lack of a record of treatment and because of her involvement with alternative healing practices, some of which she had used on Laura, the young woman would be better cared for and happier in the stable environment her father could offer. The judge granted full custody to Ishmael with visitation to Sayra.

That was two years ago. Sayra learned recently that Ishmael and his girlfriend were planning to get married and move into the girlfriend's house. The girlfriend has two cats and has told Ishmael that Laura's dogs, whom Laura has had since she was ten years old, cannot come to live with

them. Sayra believes this would be traumatic for Laura. One of the main symptoms of autism is difficulty connecting with other people. It took Sayra and Ishmael years and extraordinary love and patience to get Laura to trust them enough to open up to them. They and Carla, who shares Laura's passion for animals, are the only people in the world to whom Laura connects. Otherwise, her primary emotional connections are to her two dogs and her guinea pig.

With great reluctance and fear, Sayra decided she had to get the court involved. She talked to Carla, who recommended the lawyer to whom Sayra ended up going. The lawyer filed a complaint for modification of the custody decree based on the "changed circumstances" of the marriage and move. At the pre-trial hearing, where Ishmael once again had a lawyer, the judge appointed the same lawyer who had represented Laura in the initial custody case to represent her in the modification. Sayra knows that Laura does not feel safe with her lawyer and that they have never had a real conversation, because Laura will not even look directly at someone else, let alone talk to them, unless either Sayra or Ishmael is there with her.

2. Lillian and Ellie's Story Revisited

The lawyer for Lillian might explore whether there really is a conflict between her interests and Ellie's. What are their actual financial resources? What kind of relationship do they have, not just on paper, but in reality? What is Lillian's interest in having the lawyer draft the will for Ellie? What is Ellie's interest in the same? Are there other people who might need to be involved in these conversations? Are there other interests that might be at stake? What about the various children? He might also wonder if there are reasons not to try to separate the two women, even for a brief period. Why has Lillian always wanted Ellie present for the meetings with the lawyer?

This lawyer might also look carefully through his extensive files on Lillian, where he will probably discover quite a bit about Ellie as well, as their interests are and have been inextricably intertwined for so long.

They were sisters. They took care of each other, shared their food stamps and their food, fought like cats and dogs, exchanged recipes, secrets, germs, tips on life and love. They watched as partners came and went, children grew up and moved on, other relatives grew old and died. They always walked to church together, took turns grocery shopping, traded rides to the post office and the bank, finished each other's sentences and kept track of each other's reading glasses. They were sisters.

They had lived together for thirty years, ever since Lillian's husband went out one day to buy cigarettes and never came back. Luckily, Lillian and her husband had already managed to buy the tumbledown house where they had lived for the five years that they were married before he left. Before moving in with Lillian, Ellie had lived with her own husband, who

beat her up every time he got drunk, which was pretty much all the time. Lillian had tried for years to get Ellie to leave him and come live with her, but Ellie never felt comfortable imposing on her sister as long as Lillian's husband was around. Once he left, Ellie managed to get herself out of the mess she was in, and she and her two kids moved in with her sister. They had been together ever since.

Years ago, Lillian thought about trying to get Ellie's name added to the deed, but her neighbor told her it would mess up Ellie's welfare benefits, and since that was income both sisters depended on to pay the mortgage, among other expenses, they decided just to leave it as it was. But the house is Ellie's home, whether or not she is on the deed. Since the welfare payments ended when Ellie's youngest child grew up and moved out ten years ago, the sisters now live on Lillian's disability benefits and whatever money they bring in from their craft business.

Ellie is a scavenger. Every fall and spring, she scours yard sales, garage sales and estate sales and even a couple of dumps in high-class neighborhoods, gathering other folks' trash to turn into her own treasure. She converted part of the dining room into a crafts studio, and she and Lillian spend hours sorting through the stuff Ellie finds, adding a dab of paint here, a stitch of thread there, a valance of lace elsewhere. Every year from November 1 through December 24, they run a "Holiday Shop" out of their front room. Ellie does the customer service, also known as the hard-sell end of the business, while Lillian runs the cash box.

Over the past ten years, word of mouth has gained the Holiday Shop a certain amount of notoriety and lots of customers. They make enough profit in the two months to supplement their benefits income and cover their living expenses for the year. Plus, they are able to put some money into a savings account that they have been keeping ever since they started the business. The account is in Ellie's name, but she's not good with numbers, so Lillian keeps track of all the money.

On particularly cold days in February, the sisters put their feet up in front of the space heater and go over the bank book together, fantasizing about that trip to Jamaica they've always wanted to take. Or, in the middle of August, when there is no breeze anywhere but right smack in front of the creaky old fan, they pull out the bank book and dream out loud about that cruise through Alaska to see those icebergs.

C. COLLABORATION

Notice how in these versions of the two stories, the ethical issues that seemed so prominent in the first "official" telling fade almost into nothing. In Sayra's case, the lawyer has a much better understanding of how Laura can and does (or does not) communicate and what meeting Laura might mean. In Ellie and Lillian's case, the lawyer might begin to have a different understanding of who his client is and how the two sisters conceive of

themselves. We will see in this section how understanding their clients in this contextual way might empower the lawyers to preempt the ethical issues altogether in these cases.

By widening their frames of inquiry, simply by being curious and compassionate, these two lawyers are now much better situated to take the next step in representing their clients — figuring out how to construct a legal story that incorporates these narratives and can be heard by the decision-makers in the legal system.⁹⁴ This next step, though, is not one for the lawyer to take alone.⁹⁵ As Lucie White describes, the lawyer-client relationship is not a “unidirectional ‘professional service.’” Rather, it is a collaborative communicative practice.⁹⁶ This means, as we have seen, that the lawyer must attend to the client carefully and with an open mind to be able really to hear her story. It also means that the lawyer must participate actively in the relationship with the client.⁹⁷

The lawyer is an expert in the rules that govern the particular legal system in which the representation is taking place, and she must bring that expertise to the relationship and add it to the mix of things that go into constructing the new story.⁹⁸ The lawyer is also an expert in translating the legal system’s assumptions and expectations. Lawyers have relationships both to law and legal regulation and to clients and their narratives, and they have to negotiate both of those kinds of relationships. They have to understand the official stories as well as the clients’ stories, and they have to bring that understanding to bear on the representation. That is the lawyer’s role in the collaboration.

94. This is not a rigid one-two process, but a more fluid back and forth between information gathering and problem solving. I separate them out in this way to more easily analyze the two processes: learning the client’s initial story and crafting her “legal” story. Binny Miller has written extensively about the construction of case theory, which is the incorporation of law, facts, and client goals into a story that can be used to drive a case or an organizing campaign. Miller, *Give Them Back Their Lives*, *supra* note 44; Miller, *Teaching Case Theory*, *supra* note 44.

95. For some wonderful empirical analyses of the lawyer-client relationship in different contexts, see generally Maureen Cain, *The General Practice Lawyer and the Client: Towards a Radical Conception*, 7 INT’L J. SOC. L. 331 (1979); Herbert M. Kritzer, *Contingent-Fee Lawyers and Their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship*, 23 LAW & SOC. INQUIRY 795 (1998); Austin Sarat & William L. F. Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction*, 22 LAW & SOC’Y REV. 737 (1988); Susan P. Shapiro, *Bushwhacking the Ethical High Road: Conflict of Interest in the Practice of Law and Real Life*, 28 LAW & SOC. INQUIRY 87 (2003); Susan P. Shapiro, *If It Ain’t Broke . . . An Empirical Perspective on Ethics 2000, Screening, and the Conflict-of-Interest Rules*, 2003 U. ILL. L. REV. 1299 (2003).

96. Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice*, 1 CLINICAL L. REV. 157, 158 (1994).

97. See, e.g., LOPEZ, *supra* note 85, at 43-44; Alfieri, *supra* note 27; Piomelli, *supra* note 53, at 511-12; White, *supra* note 96, at 158.

98. Ascanio Piomelli warns us not to avoid the law, but to put it in its place. At times, the law’s tendencies to narrow the scope of disputes, parties, and issues, to focus simply on the facts established in a record, and to allocate decisions to a more or less disinterested outsider, are quite helpful. Piomelli, *supra* note 53, at 512.

But the collaboration also calls upon lawyers to be learners and suggests they must view their clients as experts in their own deeply contextual lives.⁹⁹ Scholars like White, Lopez, and Piomelli challenge lawyers to recognize that "at the heart of collaboration is the notion that lawyers and clients will learn from each other and teach each other, and that they will work together to develop and carry out persuasive strategies."¹⁰⁰

What would this new collaborative relationship look like in these contexts? Borrowing from the language of creative problem solving, these collaborations would ideally focus on the "underlying needs and interests," rather than on the "positions," of the individuals involved as well as of society.¹⁰¹ In order to engage in this kind of problem solving, the lawyer and client together must consider values and goals: their own, those of others involved in the problem, and those of the relevant legal rules.¹⁰² In addition, the client and lawyer should inquire into the resources available to them outside the legal system and should work to anticipate and prevent future problems when crafting a solution to the current problem.¹⁰³

99. Gerald Lopez reminds us that "subordinated people do deploy story/argument strategies, some remarkably ingenious and resourceful, to contest the roles others would assign them." LOPEZ, *supra* note 85, at 49.

100. Piomelli, *supra* note 53, at 448.

101. Linda Morton, *Teaching Creative Problem Solving: A Paradigmatic Approach*, 34 CAL. W. L. REV. 375, 378 (1998).

102. *Id.* See also Jennifer Gerarda Brown, *Creativity and Problem Solving*, 87 MARQ. L. REV. 697 (2004); Janet Weinstein & Linda Morton, *Stuck in a Rut: The Role of Creative Thinking in Problem Solving and Legal Education*, 9 CLINICAL L. REV. 835 (2003).

103. See, e.g., Morton, *supra* note 101, at 378. See also Carrie Menkel-Meadow, *The Lawyer as Problem Solver and Third-Party Neutral: Creativity and Non-Partisanship in Lawyering*, 72 TEMP. L. REV. 785 (1999). In that piece, Carrie Menkel-Meadow describes her vision of a lawyer as:

[A] professional with formal legal training who employs law, as well as other relevant disciplines, to solve human problems and disputes . . . and who facilitates and engages in processes designed to accomplish compliance with law and the pursuit of justice as members of society seek to accomplish legitimate aims of individual and social life. . . . Human disputes, problems, [etc.], while often having legal implications, most often involve a host of other concerns: intrapsychic (emotional), interpersonal (social, including both familial and more instrumentalist relations, as in employment), economic, political, moral, and religious.

Id., at 793-94. Menkel-Meadow exhorts lawyers to use:

[C]ombinations of legal thinking with other kinds of thought processes and creativity. A simple inventory of needs, interests, claims, wants, and goals of all parties will help develop the possibilities for solution searching for the creative lawyer who looks for both common ground, as well as complementary and conflicting needs.

Id. at 797. Similarly, Kimberly O'Leary breaks down the process of problem solving into four steps: step 1: Understand the client's problem; step 2: Identify actors affected by the legal problem; step 3: Research and understand diverse perspectives; step 4: Pose options, including a consensus-building option, to the client. O'Leary, *supra* note 51, at 81-86. See also Menkel-Meadow, *supra* note 50, at 280-81 ("Collective grappling with ethical problems as they are happening has always seemed far more enriching [I]t seems to me that before we finalize our rules we need to hear more conversations with . . . others who have new, if complex, suggestions for how we should determine legal morality.").

D. (UN)REPRESENTED PARTIES?

Sayra's goals seem to be twofold: to regain custody of Laura and to resolve her family tensions with as little adversity and outside involvement as possible. The lawyer could explore with the client how to present her story to an outside decisionmaker as fully as possible so that she is not portrayed as an irresponsible mother or manipulative ex-wife. Part of this process — the construction of her story — might include meeting and getting to know Laura.

The lawyer would learn from Sayra about the effects of Laura's disability and the importance of Laura's connections to Sayra, Ishmael, and Carla, the acupuncturist. Then she and Sayra together might determine that Laura was not getting meaningful representation from her own lawyer because of the lawyer's failure to understand that Laura's disability prevented Laura from being able to connect with her lawyer without help from someone Laura trusted.

The lawyer might be able to offer her expertise about the policies behind the rule against talking with represented parties, that is, to protect them from coercive lawyers, manipulation, and other undue influences. The lawyer and client would have a conversation in which they explored the potential impact on Laura of meeting her mother's lawyer. Finally, they would need to explore how to interact with Laura in a way that did not infringe on the rights of the other people involved, such as Laura and Ishmael. Could they meet Laura and not talk about the custody issue, that is, where Laura liked living? Could they have a meeting with Laura at which Carla, the acupuncturist, was present but not Laura's lawyer? Could they suggest to Ishmael's lawyer that Ishmael and Sayra meet with each other without any lawyer present? Could the lawyers mediate a discussion with Sayra and Ishmael and involve Ishmael's fiancée and Carla as well?

All of these possibilities begin to address the multiple interests present in this case: protecting Laura from manipulation, preventing individuals from coercion, and resolving issues in ways that address the concerns and the needs of the various and connected characters, not just the two or three distinct "legal" actors. As such, they offer the promise of long-lasting, comprehensive, client-empowering solutions.¹⁰⁴

104. A full examination of the potential benefits and certain complexity of bringing other professionals into the resolution of legal disputes is beyond the scope of this Article. See, e.g., Stacy L. Brustin, *Legal Services Provision through Multidisciplinary Practice*, 73 U. COLO. L. REV. 787 (2002); Paula Galowitz, *Collaboration between Lawyers and Social Workers: Re-examining the Nature and Potential of the Relationship*, 67 FORDHAM L. REV. 2123 (1999); Janet Weinstein, *Coming of Age: Recognizing the Importance of Interdisciplinary Education in Law Practice*, 74 WASH. L. REV. 319 (1999).

E. 'CONFLICTS' OF INTEREST?

As for Lillian's case, her goal seems to be to maintain financial and emotional stability in her life with Ellie. The conflict issue has clearly never occurred to either sister. Lillian does not see this as a question of two different cases or clients; she sees the lawyer's work to draft Ellie's will as part of his legal obligation to her, Lillian.

The lawyer might offer his expertise on their rights to zealous advocacy, which, as described earlier, would involve individual meetings and waivers. But the lawyer must be open to the possibility that neither sister really wants that. With his greater understanding of both Ellie's and Lillian's past relationships with men — Ellie's physical abuse and Lillian's abandonment — the sisters' insistence that they not be separated in the context of the representation might make more sense. For the purposes of this case, Lillian and Ellie think of themselves as one; they, as a unit, are The Client.¹⁰⁵

By the same token, the lawyer's own understanding of his role as advocate might need to shift, challenging the assumption of the lawyer-client dyad and making room for the possibility that he actually could, consistent with his duty to provide zealous advocacy, represent both sisters at the same time.¹⁰⁶ Can the sisters work together with the lawyer, as one client, to fashion a relationship that protects all three of them, in light of how each individual self-identifies?

Are there other characters they would like the lawyer to bring into this discussion? A minister or other significant person? Are there other people who might have an interest in their wills? Children? Neighbors? The two absent husbands? What about creditors? The lawyer's job, in this case, might be to round up all the interested "parties," legal and otherwise, so that whatever decisions he and the sisters end up making incorporate and address those multiple interests, both now and for the foreseeable future. This framework also provides the potential for long-lasting, comprehensive, and satisfying solutions for both lawyer and client, clients, or client.

V. CONCLUDING THOUGHTS: THE RULES ARE NOT (NECESSARILY) THE PROBLEM

This Article is about two cases where neither the clients nor the lawyers walked away happy, satisfied, or feeling that justice was served. In both cases, as in many others, the lawyer could not do — or did not think she could do — what the client wanted her to do, even though it was proba-

105. See Kruse, *supra* note 48, at 412.

106. Thomas Shaffer has a famous discussion of a scenario in which a lawyer undertakes to write a will for a husband and wife. He is one of the first ethics scholars who thought through the idea that lawyers often represent families and not individuals in them and that lawyers should be able to conceive of their work this way. See, e.g., SHAFFER & COCHRAN, *supra* note 3.

bly what would have been best for both the client and the system in which the client and the case were operating. In both cases, this was not because what the client wanted the lawyer to do was illegal or immoral or even ethically (with a small “e”) questionable; these were not stories about body hidors or forgers or perjurers. The lawyer could not act in the best interests of her client because the lawyer understood herself to be hamstrung by the Rules of Ethics (with a big “E”).

I began this exploration with a series of questions about our conflicting and competing loyalties and roles to the client, to ourselves, and to the system of justice. I conclude it now by suggesting that we do not have to answer those questions for every case and every client. We just have to see how in these two cases, the lawyer failed to be loyal to even one of those entities — from that we learn. Goldfarb describes how theories of ethical regulation evolve from experience with cases such as these, emerging as they do “from this network of relationships when we seek to resolve and explain our resolutions of the quotidian dilemmas that we encounter in the complex, nuanced, temporal context in which they arise.”¹⁰⁷

From these two cases, then, we can begin to construct a tentative theory about effective and ethical representation of clients. The theory has two elements. First, any system of ethical regulation must give the lawyer discretion to decide how the rules apply to any particular client’s story. Second, the lawyer must exercise that discretion critically and collaboratively with the client. In this way, the lawyer and client together can construct a new story that incorporates the needs and interests of multiple parties and perspectives, and seeks to address the present and future legal and non-legal concerns of the particular client.¹⁰⁸

I can hear at least some of the criticisms of this proposal even as I write: This system based on standards and not rules will result in anarchy. With all of these different measures floating around, how will regulators be able to regulate? We all know nice guys finish last; giving lawyers this kind of discretion means the bad guys will manipulate the rules and the good guys will lose out. Even the best-intentioned good guys might not have the skills or the time to engage in the kind of process described here.¹⁰⁹

107. Goldfarb, *supra* note 50, at 1697-98.

108. Paul Tremblay and others have written extensively on the legal profession’s adoption of the medical model of case-by-case analysis, known as casuistry. *See, e.g.*, Paul R. Tremblay, *Shared Norms, Bad Lawyers, and the Virtues of Casuistry*, 36 U.S.F. L. REV. 659 (2002); Paul R. Tremblay, *The New Casuistry*, 12 GEO. J. LEGAL ETHICS 489 (1999); Paul R. Tremblay, *The Role of Casuistry in Legal Ethics: A Tentative Inquiry*, 1 CLINICAL L. REV. 493 (1994). *See also* Kruse, *supra* note 48, at 417-19; Wendel, *Public Values*, *supra* note 2, at 107-19.

109. As Jenny Lyman has remarked in another context, “[l]earning more about real clients seriously complicates the practice of law.” Jennifer P. Lyman, *Getting Personal in Supervision: Looking for That Fine Line*, 2 CLINICAL L. REV. 211, 228 (1995).

But let us take another look at what I am suggesting. I am not proposing a major overhaul of the Rules of Professional Conduct. Rather, I am using the ethical rules as a metaphor, a lens through which to examine the lawyer-client relationship. The Rules of Professional Conduct are not the problem, or, at least, they are not the whole problem. The problem is how we as lawyers are learning to interpret and apply and in fact interpreting and applying, the Rules, without enough attention to the individual client's goals, needs, or narrative context.

Therefore, I propose we use different tools to interpret what the Rules of Professional Conduct mean. It is our job as lawyers to figure out how they apply to particular situations. We interpret rules by plugging them into stories about the world. If we are not critically reflective about it, the stories we use are those based on our own understanding of the world, our own stories. As I have tried to show through these two clients' situations, our own stories, and those on which the Rules are based, often fail to describe adequately our clients' legal and non-legal concerns. As a result, the solutions to which our stories lead us often fail to address carefully those concerns.

Rather than interpreting the Rules based on our own stories, we need to try to interpret them based on stories we construct collaboratively with our clients. Sometimes those new stories might lead us to interpret the Rules just as we would have under our own stories. Part of the value of Rule 1.7, for example, is that it forces the lawyer to discuss particularly thorny issues with the client, and in some cases such a discussion might be all that is necessary to address and resolve any ethical concerns the lawyer might have. Part of the value of Rule 4.2 is that it requires lawyers to think hard about their motivations in interacting with the other parties. In some cases, such reflection may indeed prevent overreaching on the part of the lawyer. But in other cases, such as those described in this paper, the official stories underlying the Rules do not really address the concerns presented by the particular clients. In these cases, undertaking a collaboration with the clients to construct a new story, which would lead to a different interpretation of the Rules, might produce a more ethical and satisfying result.

Yes, this system might be chaotic and difficult to regulate. Yes, sometimes bad guys will manipulate the rules to pull one over on the good guys. Sometimes the good guys themselves might make mistakes.¹¹⁰ As we are all too well aware, however, our current system of regulation is chaotic and difficult to enforce,¹¹¹ it is vulnerable to manipulation by the bad guys at the expense of the good guys,¹¹² and the good guys themselves often do

110. As Spivak notes, describing the importance of attending to the stories of outsiders, "And you make mistakes. Big deal." *THE SPIVAK READER*, *supra* note 31, at 307.

111. *See, e.g.*, Wilkins, *supra* note 8.

112. *See, e.g.*, David Jay Luban, *Making Sense of Moral Meltdowns*, in *MORAL LEADERSHIP: THE THEORY AND PRACTICE OF POWER, JUDGMENT, AND POLICY* 57-75 (Deb-

make mistakes.¹¹³ What my telling and retelling of the stories demonstrates is that rather than increasing the number of sticky ethical situations, paying closer attention to client context and involving the client more in constructing her legal narrative actually resolves or even preempts conflicts. It is possible, therefore, that from those new narratives, the ones constructed collaboratively by the lawyer and the client, an ethical system will emerge that allows lawyers to be loyal to themselves, their clients, and the legal system, all at the same time.

orah L. Rhode ed., 2006); Gordon, *supra* note 10.

113. See, e.g., *Top 10 Ethics Traps (And How to Avoid them)*, ABA J., Nov. 2007, at 30.